BLEED THROUGH

APPENDIX A

Stipulation

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF ALBANY

IPPOLITO-LUTZ, INC.,

Plaintiff,

—against—

COHOES HOUSING AUTHORITY,

Defendant.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the Record on Appeal, heretofore prepared and copies of which were filed, uncertified, with the Appellate Division, Third Department on the appeal herein shall have omitted and removed therefrom, pages 37 through and including 59, and that all material contained in the Brief of Defendant-Appellant, which refers to the aforesaid omitted and removed material, shall likewise be removed, and that upon presentation of the original of the Record on Appeal which has been amended as aforesaid, the attorney for the plaintiff-respondent agrees to stipulate to its correctness as the Record on Appeal herein, and that the same may thereafter be filed with the Appellate Division, Third Department.

Dated: November 4, 1968

M. CARL LEVINE, MORGULAS & FOREMAN
Attorneys for Plaintiff-Respondent

MURPHY, ALDRICH, GUY, BRODERICK & SIMON
Attorneys for Defendant-Appellant

APPENDIX B

July 29, 1975

Honorable
J. Clarence Herlihy, Presiding Justice
Appellate Division, Third Department
Justice Building
Albany, New York

Re: *Ippolito-Lutz, Inc.* v. *Cohoes Housing Authority*

Dear Judge Herlihy:

The writer regrets imposing on this Court's time by addressing to it a post-motion letter, but the receipt by this office of movant's reply papers one day *after* the motion was marked "submitted" mandates a brief letter.

Predictably, Appellant again argues the question of the five post-motion affidavits. To recapitulate briefly:

The affidavits in question were, concededly, *not* before the Court at Special Term when it decided the Respondent's motion and were, therefore, not a proper part of the record on the appeal from that decision. Appellant so stipulated, after a motion to expunge had been made. Appellant itself then removed the affidavits from the physical record before this Court on Appeal, but did not remove references to and summaries of those affidavits from his brief. Respondent, thereupon moved before this Court to dismiss the appeal and this Court granted that motion, dismissing the appeal unless Appellant removed the material which was the subject of the motion. Appellant did

not appeal that order or make any move to reargue. Rather, Appellant proceeded to place the appeal on the Calendar of this Court, but *without* removing the offending material from its brief—in *direct defiance* of the order of this Court.

Now, Appellant is once again arguing that the affidavits should have been part of the record, and persists in making the same argument that was made before this Court on oral argument. Most of what Mr. Noonan has to say has been fully dealt with in our answering affidavit with only a few additional comments.

When Justice Pennock refused to sign an order to show cause for reargument, Appellant could have proceeded by normal notice of motion. Appellant *did not do this.* Mr. Noonan now says that any further effort would have been "futile" (p. 2 of Respondent's affidavit of July 25, 1975). This is hardly the case. Had a motion to reargue been made and Respondent given, thereby, an opportunity to *reply* to the contents of the affidavits in question), and *then* denied, Appellant could have appealed the denial of that motion and the original motion together, on a full record. This Appellant *did not do.* It can hardly come before this Court *now* and argue that the Court should do for it what it failed to do for itself nine years ago.

On page 3, Appellant now makes an argument (not made on oral argument before this Court (and barely touched on in its brief) that the application of CPLR §3215 to the entry of judgment be reconsidered. The answer to this is brief and simple. First of all, the entry of a default judgment under CPLR §3215 is not appealable *per se* (see

Practice Commentary of David Siegel, McKinney's Consolidated Laws of New York, Book 7B, CPLR §3215, p. 881). The proper and *only* procedure is to move to vacate that judgment under CPLR §3215 and appeal the denial of that motion. Such a motion must be made within *one year* of the entry of the judgment under CPLR §5015(a). This Appellant did not do so, and the time has long since passed to complain about any alleged technical irregularity in the entry of the judgment. Furthermore, the order of Pennock, J. (May 11, 1967) contains the following provision: "Therefore, the Court determines that the issues to which the information was requested is relevant and shall be *deemed resolved for the purposes of the action in accordance with the allegations of the complaint.*"

Accordingly, judgment could be entered by the Clerk without further proceedings, which would have been merely redundant.

Finally, Mr. Noonan refers to the case of *Feingold* v. *Walworth Bros. Inc.*, 238 N.Y. 446, as holding that the "question of whether or not there was sufficient evidence before the Court to warrant the striking of an Answer is a 'matter of law' ". The *Feingold* case announces no such general rule. The issue there was whether the answers of certain co-defendants could be stricken because a certain *other* co-defendant had failed to comply with a discovery order dealing with documents and information wholly within *his* control. That was, indeed, a "question of law", but it has nothing whatever to do with the issues here involved.

It is respectfully submitted that Appellant's motions for "reargument" and for leave to appeal should be denied, in toto, with costs to Respondent.

Respectfully,

M. Carl Levine, Morgulas & Foreman

By Jerrold Morgulas

JM/jmb

cc: William E. Noonan, Esq.
Martin, Noonan, Hislop, Troue & Shudt

APPENDIX C

October 3, 1975

Mr. Jack Gary, Motion Clerk
Court of Appeals
Court of Appeals Hall
Eagle Street
Albany, New York 12207

Re: *Ippolito-Lutz, Inc.* v. *Cohoes Housing Authority*
(Motion For Leave To Appeal)

Dear Mr. Gary:

We are herewith filing, under separate cover, our answering affidavit and memorandum of law in opposition to the motion by Cohoes Housing Authority for leave to appeal to the Court of Appeals.

As I stated to you during our telephone conversation last week, the appellant has included, in the bound document, which he refers to as "Notice of Motion, Moving Affidavit and *Supporting Papers*", a series of affidavits which were *not part of the record on appeal before the Appellate Division, Third Department.* Furthermore, appellant has made copious references to those documents and to the circumstances attendant upon them *in the brief* which he has submitted in support of his motion for leave to appeal. As I stated to you, the appellant had agreed *by written stipulation* dated November 4, 1968, to remove the offending documents from the record and, also, to remove all references thereto from his brief. We enclose herewith a photostatic copy of that stipulation, as ENCLOSURE "A".

FILED THROUGH

Thereafter, appellant did, in fact, finally remove pages 37-59 from the copies of the printed record previously filed in the Appellate Division, Third Department. We are enclosing a xerox copy of our only remaining copy of that record for your easy reference. (ENCLOSURE "C")

Due to the fact that appellant had failed and refused to *remove from his brief* the references to the affidavit appearing on pages 37-59 of the original filed record, a motion was made in the Appellate Division, Third Department, to dismiss the appeal unless appellant did remove the offending references and serve a corrected brief. This motion was granted and an order conditionally dismissing the appeal was entered on May 6, 1975, a copy of which is annexed as ENCLOSURE "B". Appellant *did not,* in fact, correct his brief, and made oral application at the time of argument to be relieved both of the stipulation and the effect of the order of the Appellate Division of May 6, 1975, which application was promptly denied. The Court, thereupon, heard the appeal and affirmed it unanimously.

Now, as part of what appellant has denominated as "Moving Affidavit and Supporting Papers" (at pages 25-41), it has *once again included the offending affidavits.* You will note that the pages, as reproduced, are exact photocopies of the pages of the original record, and still bear the original pagination, clearly showing that they are *pages 39-53* of the original record, precisely those pages *which were removed pursuant to stipulation of November 4, 1968,* the terms of which stipulation were subsequently reinforced by the May 6, 1975 order of the Appellate Division, Third Department, from which, we may note, no appeal was ever taken.

Plaintiff-respondent vigorously protested what we believe to be a gross violation of rules of procedure and the wholly improper inclusion of material which was not part of the record before the Appellate Division, Third Department. Accordingly, we wrote to appellant's attorney, on September 19, 1975 (ENCLOSURE "D"), and demanded removal of the offending material. Appellant has refused to comply.

We note that Court of Appeals Rule 500.9(a) specifically states that a motion for permission to appeal "shall be based on a copy of the record in the Court below". Appellant has completely disregarded the requirement of this rule and, instead of serving "a copy of the record in the Court below" in support of his present motion, has concocted an entire new record for himself and thrust it before this Court as part of his moving papers.

It is respectfully submitted that, under the circumstances and for the foregoing reasons, appellant's motion should be stricken from the calendar.

Very truly yours,

M. CARL LEVINE, MORGULAS & FOREMAN

By: JERROLD MORGULAS

cc: WILLIAM E. NOONAN, Esq.